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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 454th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 19 June 1991, at 2.30 p.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 2.40 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 7 (continued)

1. Ms. KOSKELO (Observer for Finland) drew attention to her Government's proposal for article 7(2) (A/CN.9/347, p. 21). Her delegation contended that the problem of adequate cover for the payment order was not solved by article 4(6). It took the view that late execution of a payment order might not be the only cause of delay to a payment order once a bank had accepted it. Failing to take the necessary steps to provide funds for the next receiving bank to implement the order was equally important. A receiving bank which had accepted a payment order had a duty to execute it, first by issuing and implementing the order, and then by taking steps to provide funds for its acceptance by the next receiving bank. Subparagraph (b) of the text proposed by her Government contained the word "cover", but she would not insist on it being used; a formulation such as "other steps necessary to implement the payment order" might be preferable.

2. Mr. DE BOER (Netherlands) supported the Finnish proposal. The idea it embodied had been accepted in principle by the Working Group and was in accord with the proposal of his own Government for article 16 (A/CN.9/347, p. 45). It was immaterial to him whether the idea was incorporated into article 7(2) or article 16.

3. Mr. BHALA (United States of America) opposed the Finnish proposal. As worded, article 4(6) of the Model Law contained an obligation to pay. Article 5 contained a clear definition as to when payment was to be made. What was proposed was a fundamental addition that would replace an obligation to pay by an obligation to have paid. Such an obligation would lead on to the thorny issue of what constituted cover. A basic objection to it was that it would impinge on the credit decisions of the banks involved. At present, an implementing payment order followed on the original payment order throughout the chain from originator to beneficiary; whether the intermediary bank accepted the payment order of the sending bank without funds was a credit decision to be left to that intermediary bank. To require the intermediary bank to have funds or the sending bank to send funds would affect their freedom of decision, with which the Model Law should not interfere. The consequences of such interference would be temporary or permanent impediment to the processing of many payment orders and obviously deleterious effects on high-speed credit transfers.

4. Finally, underlying the proposal was the assumption that the credit transfer system worked by matching payment orders with covering payments. That was not the case; it was simply not practical for every one of, say, 18,000 payment orders a day to be matched with funds to see whether it was acceptable.

5. Mr. BURMAN (United States of America) endorsed the arguments of the previous speaker. Reasonable though the provision proposed by Finland might seem, it would conflict with existing international banking practice and would seriously interfere with a variety of transmission methods used by intermediary banks, particularly those in third world countries that did not have access at certain points of the transaction to alternative funding sources.

6. Mr. ERIKSSON (Observer for Sweden) agreed with the delegation of Finland on the need for a rule on cover for payment orders.

7. Mr. GREGORY (United Kingdom) said that he was not at all sure that he agreed with the analysis made by the United States delegation of the consequences of the Finnish proposal. The United States delegation had given two particular reasons why the provision proposed by Finland would be incompatible with current practice. The first was that it would interfere with intermediary banks' credit decisions; he was not certain that would be the case. A sender had a duty to pay, and that did not affect the decision of the receiver as to whether to accept a payment order before obtaining payment. The credit decision seemed to him to be one which the receiver had to take, and his decision to accept and provide payment without waiting for payment himself seemed to be separate from the question whether his sender should send him payment.

8. The second point made by the United States delegation was the procedural problem of matching funds with payment orders. That did not seem to him to flow from the Finnish proposal, which recognized the existence of netting systems and other ways in which payment might be made, but said nothing of making individual payments to cover individual payment orders; all it required was that the bank which accepted the payment order must take appropriate steps to provide cover for its implementing payment order.

9. He agreed with the representative of the Netherlands that the issue was one which the Working Group had felt needed to be addressed in some way. It was closely related to article 4(6) and he thought that the matter was covered by the United Kingdom's written proposal to insert a reference to article 4(6) in article 16 (A/CN.9/347, p. 63, para. 29), so that a bank late in paying would incur an interest penalty. He put it forward as an alternative to the Finnish proposal.

10. Ms. KRAG JORGENSEN (Denmark) said that she had found the United Kingdom explanation very helpful. Her delegation nevertheless preferred the Finnish alternative.

11. Mr. CRAWFORD (Canada) said that in his view the matter was one of drafting rather than of principle. He believed that some sort of provision for cover should exist in the draft. In his opinion, article 7(2) was reasonably clear as it stood. If a close look was taken at its final clause, it could be construed as providing everything needed to meet the requirements of the Finnish delegation. A sending bank was already under a duty to provide cover.

12. Mr. HUANG Yangxin (China) agreed with the representative of the United Kingdom on the close link between the Finnish proposal and article 4(6). The crux of the matter lay in the point at which a receiving bank which sent out a payment order itself became a sender, and the need to determine at what point it should provide cover. Did the obligation to provide funds arise when the payment order was issued or after it had been accepted? The logical step, if the Finnish proposal was accepted, would be to bring article 4(6) into line with article 7(2).

13. Mr. ABASCAL ZAMORA (Mexico) recalled that the Working Group on International Payments had analysed at length the obligation of a receiving bank on receiving a payment order and had agreed on the present text on the understanding that the key word was "appropriate", unclear though that word might be. The Commission would do better to leave the text as it stood than to repeat the discussion which had taken place in the Working Group.

14. Mr. AZZIMAN (Morocco) said that in his view the two obligations, that of issuing a payment order and that of covering a payment order, were assumed by a bank as two separate but complementary obligations. To that extent he supported the position of the delegation of Finland.

15. As to the practical difficulties which, in the view of the United States delegation, would result from acceptance of the Finnish proposal, particularly in third world countries, he did not think they would arise if the provision was couched in general terms; problems would occur only if it included a great deal of practical detail. His suggestion for the provision on cover would be on the following lines: "the receiving bank is required to take the necessary action to ensure coverage of a payment order". That would avoid the imposition of any constraints on the bank.

16. Mr. NEWMAN (United States of America) said that the interests of ensuring consistency in the Model Law were best served by adhering to the existing text.

17. Mr. SKELEMANI (Observer for Botswana) said that there was no dispute as to the principle. In his view, the paragraph as drafted highlighted what was essential. If that was not the general view, he could agree to the paragraph being amended in accordance with the proposal by Finland.

18. Mr. GREGORY (United Kingdom) said that the obligation to provide cover existed under article 4(6). He reiterated his view that the question of delay in providing it might be addressed in the context of article 16.

19. Ms. KOSKELO (Observer for Finland) said that the following was an example of the problem her delegation was trying to solve: if a sending bank which had received a payment order executed it on day one by sending its own payment order to the next bank, but failed to make the funds available for the payment until day five, the next bank might not accept the order until day five; that would mean a delay of four days in dealing with the transaction. As the draft was presently worded, however, the sending bank's duty to pay arose only upon acceptance of the payment order by the next bank in the chain. Her Government's proposal did not affect the methods of payment which banks used between themselves; those arrangements depended on the relationship between

(Ms. Koskelo, Observer for Finland)

the banks concerned. She could not accept the Canadian view that the matter was catered for by the last clause of the existing wording of article 7(2).

20. Mr. HUANG Yangxin (China) said that the possibility for the Model Law to create the problem referred to by the observer for Finland would persist unless article 4(6) was modified.

21. Mr. GRIFFITH (Observer for Australia) said that his delegation recommended approval of the existing text. Otherwise, it would be difficult for the Commission to make further progress without defining the notion of "cover".

22. Mr. ABASCAL ZAMORA (Mexico) said that the obligation incumbent on the receiving bank to pay was implicit in the terms of article 7(2).

23. Mr. IWAHARA (Japan) agreed with the previous speaker and approved the existing text.

24. Mr. BURMAN (United States of America) said that in his view the problem was solved satisfactorily by reference to article 4(6).

25. The CHAIRMAN said it seemed to him that the discussion indicated a majority acceptance of the approach suggested by the United Kingdom for dealing with the problem raised by the observer for Finland.

26. He invited the Commission to take up paragraph 3 of article 7. It had before it two proposals for that paragraph: one by the United Kingdom to remove the implication that the receiving bank had a duty to detect misdirection (A/CN.9/347, p. 58, sect. 10) and the other by Finland to delete the paragraph (A/CN.9/347, p. 22).

27. Mr. BHALA (United States of America) supported the Finnish proposal.

28. The CHAIRMAN said that, unless he heard an objection, he would take it that the Commission adopted the Finnish proposal to delete article 7(3).

29. It was so decided.

30. The CHAIRMAN invited the Commission to consider article 7(4). In its written comments (A/CN.9/347, p. 58, para. 11), the United Kingdom had expressed the view that paragraph 4 was useful but too widely drawn, and had put forward an alternative text.

31. Mr. BHALA (United States of America) suggested that discussion was needed before the Commission could reach a conclusion on the notification duties set out in paragraphs 4 and 5 of article 7. Due account must be taken of the time which a bank needed to determine in what way a payment order was insufficient and then to fulfil its duty of notification.

32. Mr. NEWMAN (United States of America) explained that in the inquiries department of United States banks most problems connected with transfers of funds could be processed quickly, but he knew of no bank where they could be processed on execution day. His own bank could do so within 24 hours if it did not have to contact a third party, but the largest bank in the United States had a three-day standard for performance. He therefore suggested that at least one further day should be allowed for notification under article 7(4).

33. Mr. CRAWFORD (Canada) wondered whether the notion of detection should not also be embodied in paragraph 4.

34. The CHAIRMAN said that the words "the receiving bank shall give notice to the sender of the insufficiency" in article 7(4) might create implicit liability, the breach of which would be subject to damages. If that was not the intention, the text should be improved.

35. Mr. BHALA (United States of America) said that he had difficulty with the words "appears to be intended" in the United Kingdom proposal. He was concerned with the possibility of a wrongdoer sending instructions to a receiving bank that appeared to be intended as a payment order, so that he could subsequently hold the receiving bank liable for failure to notify him under article 7.

36. Mr. GREGORY (United Kingdom) said that the text proposed by his Government might be made more explicit by stating: "when a bank detects that an instruction appears to be intended". That would deal with the point raised by the Canadian representative. As to the possibility of fraud mentioned by the United States representative, under article 16(3), interest was payable only on funds that had been received for the period during which the bank retained the payment. It would be an extraordinarily speculative act for a wrongdoer to send money to a bank in the hope that it would fail to do something. On the basis that where there were no funds there would be no penalty, the Commission could safely accept the provision.

37. Mr. BHALA (United States of America) remarked that in his experience such a fraud was not as unlikely as the United Kingdom representative had suggested.

38. Mr. FELSENFELD (United States of America) said that the Commission seemed to consider that if a penalty was reduced the bank had less of a responsibility to carry out the law quite so assiduously. However, in the United States at least, the very strict bank regulations simply did not allow banks to take their legal obligations less seriously because the relevant penalty was lower. Any provision in the Model Law that placed a responsibility on a bank must be taken seriously, since bank regulators would see that it was enforced.

39. Mr. KAKOLEWICKI (Observer for Poland) endorsed the views expressed by the United States delegation. In practice, the obligation laid down in article 7(4) would be difficult to carry out without an extra day being allowed for the purpose.

40. Mr. ADEDIRAN (Nigeria) supported the United Kingdom proposal.

41. The CHAIRMAN said that he took it that the Commission agreed that an extra day should be allowed for compliance with the obligation contained in paragraph 4 of article 7; and that the United Kingdom's written proposal, amended along the lines suggested at the present meeting by its representative, should form the basis of the paragraph.

42. It was so agreed.

43. The CHAIRMAN invited the Commission to consider article 7(5). Many delegations had made proposals for dealing with the problem which that provision addressed, namely an inconsistency in a payment order between the words and figures describing the amount of money to be remitted. The Commission must therefore decide whether words or figures should prevail.

44. Mr. ABASCAL ZAMORA (Mexico) said that where an order was transmitted electronically, it was difficult to detect mistakes because figures alone were used. Inconsistencies became evident in a documented payment order given by the originator to his bank. The Working Group had considered that an adequate solution would be for a bank which had doubts about the amount of the order to conduct an investigation if it so wished, a position which took account of current banking practice. The last sentence of the paragraph left open the possibility for agreement on the subject between the parties.

45. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) thought that the inconsistency referred to in the paragraph could be regarded as a lack of the necessary information. His delegation favoured the existing wording.

46. Mr. AL-NASSER (Observer for Saudi Arabia) said that, having consulted banking circles in his country, his delegation had been informed that it was sufficient, in the event of an inconsistency, to rely upon words. Furthermore, if a transfer operation was halted in order to contact the bank concerned for verification, that would have an adverse effect on the main advantage of electronic transfers, i.e. their speed. It was clear that electronic transfer systems would continue to develop and that traditional transfer operations would diminish in number.

47. Mr. LIM (Singapore) drew attention to the Secretariat's comment on the paragraph (A/CN.9/346, p. 14, para. 49, second sentence) to the effect that the Working Group had expected that paragraph 5 of article 7 would apply only between the originator and the originator's bank, in other words, only to paper-based transfers.

48. Ms. KOSKELO (Observer for Finland) said that the Commission should consider what would happen if, instead of conducting an investigation into an inconsistency in the payment order between the words and the figures, the bank executed the order. In order to avoid the problem which that would create, a simple solution would be to establish a rule stating that either words or figures would prevail.

49. Mr. NEWMAN (United States of America) suggested that the words "if there is an inconsistency" should be amended to read: "If the receiving bank has knowledge that there is an inconsistency". He made that suggestion because in any manual transaction it should be the responsibility of the receiving bank to detect the error and notify the sender.

50. After a discussion in which Mr. ABASCAL ZAMORA (Mexico), Mr. CRAWFORD (Canada), Mr. POTYKA (Austria) and Mr. NEWMAN (United States of America) took part, Mr. GREGORY (United Kingdom) said that the United States suggestion did not solve the problem raised by Finland.

51. Mr. LE GUEN (France) warned the Commission against establishing in article 7(5) a distinction between credit transfers made through an electronic funds transfer system and credit transfers effected manually. If the Commission introduced the notion of an electronic funds transfer system into the article, it would have to insert a definition of such a system in article 2. As a consequence, the entire intellectual process on which the Model Law was based would be brought into question. The matter had been discussed at length in the Working Group, which had not reached agreement on it, with the result that the present provision was a compromise. If that compromise was now upset, the balance of the Model Law might be disrupted completely.

52. The CHAIRMAN suggested that the problem might be solved if the element of detection was incorporated into the paragraph.

53. He noted from a show of hands that a fairly large majority of the Commission favoured the text of article 7(5) with the addition of wording incorporating that notion.

The meeting rose at 5.35 p.m.